Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of	)	MM Docket No. 92-266
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	
	)	

REPLY COMMENTS
OF LIBERTY CABLE COMPANY, INC.

1. Liberty Cable Company, Inc. ("Liberty"), by its attorneys, hereby replies to certain comments filed in response to the Notice of Proposed Rulemaking in the above-referenced proceeding ("Notice"). Liberty's Reply Comments focus on two issues raised in the Notice: what constitutes "effective competition" (Notice: paras. 6-9) and geographically uniform rate structures (Notice: paras. 111-115).

I. Definition Of Effective Competition

2. As Liberty stated in its Comments, at paras. 27-28, "comparable video programming," under the second statutory test for effective competition, does not exist simply because a competitor offers multiple channels of video programming. Congress intended "comparable video programming" to mean qualitatively comparable programming and not simply comparable numbers of channels of programming. See Comments of New York State Consumer Protection

Board at 5. Liberty believes comparability exists when cable competitors have the same opportunity to obtain the same programming as the cable operator and to obtain that programming under the same terms and conditions as the cable operator.

3. Liberty strongly disagrees with the contention of Time Warner Entertainment Company - L.P. ("Time Warner"), stated on page 11 of Time Warner's comments, that: "If competitors are gaining at least 15 percent of potential subscribers, Time Warner urges the Commission to presume that the competitive services must be deemed comparable to cable television services or otherwise they would not have achieved such high consumer acceptance." Time Warner offers no evidence that the presumption Time Warner is asking the Commission to make is founded on anything. Indeed, Liberty suggests that this is because there is no such evidence. To the contrary, high consumer acceptance of a cable competitor might be caused by a number of factors, including: lower price, better signal, quicker installation or more responsive maintenance. There could be many reasons other than that the consumer is able to obtain "comparable video programming."

4. Liberty believes that its suggestion, in paragraph 28 of its Comments, that the Commission rely on cable competitors to bring to the Commission's attention situations where competitors are unable to provide comparable video programming to their subscribers, is a far better way to insure the existence of comparable video programming. If a complaint is filed, the burden of proof should then shift to the cable programmer to prove that

the competitors have an opportunity to obtain the same programming as is being provided by the cable operator.

5. Liberty also disagrees with Time Warner's statement in its Comments on page 12 that: "Any other interpretation would require the Commission to embark upon the slippery slope of attempting to make content-based determinations of comparability." There is absolutely no need for the Commission to engage in this type of analysis if the Commission follows the proposal, at paragraph 28, of Liberty's Comments. Under Liberty's proposal, the only thing that the Commission needs to do is to assure that at least two unaffiliated multichannel video programming distributors have an opportunity to obtain video programming which is the same programming as the cable operator and to obtain that programming under the same terms and conditions as the cable operator. Neither the statute nor Liberty's proposal requires a content-based determination of comparability, nor would Liberty ever suggest the Commission engage in such a determination.

6. If the Commission were to adopt the suggestions made by Time Warner, the Commission would emasculate the effective competition test. Furthermore, the Commission would provide additional incentive for cable operators to restrict the availability of programming to their competitors. That cable programmers indulge in such activities is unquestionable, as detailed in the Affidavit of Liberty's President, Peter O. Price, which was attached as Exhibit "5" to Liberty's Comments.

II. Geographically Uniform Rates

7. With regard to the Act's requirement for uniform rates, Time Warner states, at page 71 of its Comments, that "The Geographic Price Uniformity Requirements for Cable Systems Serving More Than One Franchised Territory Should Be Mitigated by the Idiosyncracies of Each Respective Franchise Territory." Cox Cable Communications ("Cox") makes essentially the same point regarding cross-subsidization at page 81 of its Comments. Cable operators may have non-uniform rates as long as they are prepared to justify why prices differ from one franchised territory to another, but selective rates within a franchise area are contrary to the public policy enunciated in the Act. Liberty's primary concern, as specified in its Comments at paragraph 12, is that cable operators observe the Act's prohibition on selective rate cuts whose goal is thwarting potential competition under the guise of serving public needs or meeting "effective competition." Legitimate differences in rates caused by different franchise requirements or costs imposed by franchisors or others[1/], or the existence of effective competition in one franchised area versus another, are all justifiable reasons for nonuniformity.

[1/] Liberty does not disagree with the statement in Cox's Comments, at page 83, that cable operators should be afforded flexibility to establish bona fide service categories with separate rates to reflect different costs involved in providing service. Liberty's concern, as reflected in the balance of Cox's Comments on page 84, is that if cable operators are permitted the flexibility to establish bona fide service categories, that they not abuse that right and drop rates in one portion of a franchise area to undercut a competitor.

8. Liberty suggests that it would be perfectly appropriate to initially presume the existence of a uniform rate structure throughout the franchised areas served by a technically integrated system. However, once a complaint was brought against a cable operator for violating Section 623(d) of the Act and the related Commission's rules, the burden of proof would shift to the cable operator to justify why the complained of rates were not in compliance with Section 623(d) of the Act and the related rules.

9. Time Warner offers no evidence to support the proposition, at page 74 of its Comments, that Section 623(d) of the Act does not prohibit rate structures which contain volume discounts in individually negotiated contracts with multiple dwelling units, such as apartment buildings, hospitals and condominium associations. Cox makes a similar argument, at page 84 of its Comments, as does Falcon Cable Group, at page 71 of its Comments, both of which are similarly lacking any evidence. Liberty has not found any such evidence and suggests that the proper interpretation of Section 623(d) of the Act is to prohibit such individually negotiated volume discounts.[2/] As noted at paragraph 7 of Liberty's Comments, Section 623(d) deals with the uniformity of all rates -- be they with multiple dwelling units, hotels, institutions, commercial accounts or residences.[3/]

[2/] See also, Comments of City of McKinney, Texas (p. 28), League of California Cities (section D), Town of Drexel, North Carolina (p. 28), and City of Puducah, Kentucky (p.29) which take the position that all rate discrimination is prohibited by the Act.

[3/] See, Comments of the Massachusetts Community Antenna Television Commission filed in this proceeding at p. 34, et seq.

Congress crafted Section 623(d) specifically to deny selective prices used by cable operators to drive out even the most meager alternative service competitor.

10. Falcon misses the point of the uniform rate requirement, when it argues, at pages 72-73 of its Comments, that multiple dwelling units are competent negotiators who do not need the protection of the requirement. The purpose of the uniform rate requirement is not to protect multiple dwelling units but to encourage competition to cable by preventing cable operators from using selective price cutting to thwart competition. Increased competition will, in turn, benefit all cable subscribers through competitive cable rates and improved cable service.

11. Footnote 101 of Cox's Comments and page 72 of Falcon's Comments suggest that cable operators should not be subject to rate regulation of multiple dwelling units and other commercial accounts because these accounts are more likely to face competition from other multichannel video programming distributors. Since Congress enacted the Cable Act to stimulate competition to the cable monopoly, this is certainly not a reason not to apply the uniform rate requirement of Section 623(d) to multiple dwelling units and commercial accounts. To the contrary, the purpose of the uniform rate requirement is to prevent cable operators from offering rates to multiple dwelling units and commercial accounts based solely upon the rates offered by the cable operators' competitors in an effort to thwart competition from the competitors.

12. If the Commission permits volume discounts, it should ensure that volume discounts are not individually negotiated but identical for all similarly situated users. Moreover, any class of users for which a different rate is established should be large enough that discounts do not end up being individually tailored. The Commission should further ensure that discounts are brought to the attention of and made readily available to all users or potential users in the applicable rate class. Liberty's experience with Time Warner has been that Time Warner will offer volume discounts exclusively to those users who are considering switching from Time Warner's service to Liberty's service. See Exhibit 2 to Liberty's Comments, Petition of John L. Hanks Before the New York State Commission on Cable Television. Time Warner has not routinely disseminated information regarding the availability of its volume discounts to all users in a class nor made volume discounts widely available to all users in a class. (See, paras. 9-11 of Liberty's Comments). Again, Liberty firmly believes that the Commission must commit itself to assuring that these volume discounts are more than selective price cuts designed for the purpose of killing competition.

13. Time Warner, at page 75 of its Comments, advocates that a cable operator serving an entire community should be permitted to meet the price of a cable competitor that is not required to serve the entire community or that does not face the same governmentally-imposed costs. Liberty vehemently disagrees with Time Warner if what Time Warner is advocating is narrowly focused and selective

price cutting that is subsidized from other revenue sources and designed to stifle competition. Since, as detailed in paragraphs 10 and 11 of Liberty's Comments, Liberty's experience with Time Warner is precisely such selective and anticompetitive price cutting, Liberty suspects that this is just what Time Warner is advocating. Furthermore, such practices are those that Section 623(d) was intended to prohibit. The House Conference Report states that the purpose for the uniform rate requirement is to "prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[4/]

14. Liberty rejects the Comments of Cablevision Systems Corporation ("Cablevision"), at page 25, where Cablevision states that the uniform rate structure requirement requires only that cable operators have a rate structure that is uniform throughout a franchise area, rather than some broader geographic area. The Comments of New York State Commission on Cable Television ("NYSCCT"), at paragraphs 17, 25, 26 and 27, make the same point. NYSCCT states that the provisions of Section 623(d) concerning a uniform rate structure throughout the geographic area should apply only to the franchise area, for basic service rates. Neither NYSCCT's nor Cablevision's interpretation of Section 623(d) is in concert with what Congress stated or intended.[5/]

[4/] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess., at 59, 65 (1992).

[5/] Note, for example, the abuse cited in the Hanks petition at Exhibit 2 to Liberty's Comments: Liberty's market in Manhattan is targeted by Time Warner for selective bulk rates for cooperative (continued...)

15. Liberty agrees with the Commission that if the Congress intended to use the term "franchise area" instead of the broader "geographic area," it would have been easy for Congress to utilize that terminology. Furthermore, Liberty agrees with the Commission's interpretation that Section 623(d) applies to all rates, be they basic or not. The Commission acknowledged this fact by placing discussion of 623(d) in the Notice in that part of the Notice entitled, "Provisions Applicable to Cable Services Generally." Cablevision admits, at page 25 of its Comments, that its interpretation does not agree with the plain meaning of the statute: "Although Congress used the term "geographic area" in the statute, it meant the term to refer to franchise area." That Cablevision and NYSCCT do not like the wording of the statute cannot alter the basic tenets of statutory construction. The words of the statute are very clear.

16. Liberty rejects Cablevision's dismissal of the Commission's belief that "if the meaning of geographic area is limited to a franchise area, Section 623(d) of the Communications Act would be duplicative of Section 623(e)."[6/] Cox, at page 82 of its Comments, makes a similar point, suggesting that Section 623(e) of the Act is limited to the provision of cable services. There is nothing in Section 623(e) which suggests that it is limited to the provision of cable services. Section 623(e) can easily be read to

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[5/](...continued)
apartments and condominiums while Time Warner's less wealthy contiguous franchises subsidize this predatory pricing.

[6/] See, Cablevision Comments, n. 54.

suggest that any federal agency, state or franchising authority may prohibit rate discrimination. This is certainly in keeping with the Act's vesting, with various government authorities, the ability to regulate various types of cable rates.

17. Cablevision's final point and paragraph is that an interpretation of Section 623(d) that involves geographic area and not franchise area will mean that regulation is going to be burdensome. Liberty does not dispute this fact but would observe that the burden imposed on the cable industry is one which the cable industry brought on itself. The fact that it is burdensome is not a reason to misinterpret the statute.

WHEREFORE, Liberty Cable Company, Inc. requests the Commission to adopt rules in this proceeding consistent with the views expressed within and in its Comments.

Respectfully submitted,

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